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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: current recognition and measures necessary for its strengthening

Second report prepared by Mr. Stanislav Chernichenko and Mr. William Treat in accordance with resolution 1990/18 of the Sub-Commission and resolution 1991/43 of the Commission on Human Rights

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INTRODUCTION

1. By its resolution 1989/27, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed two of its members, Mr. Stanislav Chernichenko and Mr. William Treat, as rapporteurs to prepare a brief report on existing international standards pertaining to the right to a fair trial. The Sub-Commission also requested that the rapporteurs recommend "which provisions guaranteeing the right to a fair trial should be made non-derogable".

2. On 7 March 1990, the Commission on Human Rights by its decision 1990/108, welcomed the Sub-Commission's decision to appoint Mr. Stanislav Chernichenko and Mr. William Treat to prepare a report on the right to a fair trial and requested the Sub-Commission to consider that report directly under agenda item 10 (d) at its forty-second session.

3. The two rapporteurs prepared their first brief report (E/CN.4/Sub.2/1990/34) to provide an overview of the subject and to indicate the areas concerning which further study was needed. The brief report also made some general observations and set forth the principal treaties and other international human rights standards that are the most protective of each attribute of a fair trial. Further, the first brief report discussed considerations relevant to making non-derogable at least some aspects of the right to a fair trial. In addition, its report recommended a more comprehensive study on the right to a fair trial and how that right might be strengthened.

4. Resolution 1990/18 of the Sub-Commission requested that the Commission and the Economic and Social Council endorse the decision to entrust Mr. Chernichenko and Mr. Treat, as Special Rapporteurs, to prepare a study entitled "The right to a fair trial: current recognition and measures necessary for its strengthening".

5. Resolution 1991/43 of the Commission and resolution 1991/28 of the Economic and Social Council endorsed the decision of the Sub-Commission and requested the Special Rapporteurs to draft a questionnaire on the right to a fair trial.

6. Chapter I of this second report summarizes the discussion of the first brief report and indicates several revisions in that report which will be made in the final report. Chapter II identifies new sources of international fair trial norms that have been issued since the first brief report of June 1990. Chapter III summarizes the interpretations of fair trial standards by the Human Rights Committee under the international Covenant on Civil and Political Rights. Chapter IV indicates the replies received thus far in response to the questionnaire which was distributed in April 1991. Chapter V suggests further work that needs to be accomplished in order to prepare a more comprehensive report on the right to a fair trial and to recommend ways to strengthen that right, for example, by drafting an international standard or model code. Annex I contains a supplemental bibliography of relevant material identified since the first brief report. Annex II contains a slightly revised version of the preliminary questionnaire prepared by the two Special Rapporteurs and on which they would be pleased to receive comments by members of the Sub-Commission, observers, and others who receive this preliminary report.

I. FIRST BRIEF REPORT, COMMENTS AND REVISIONS

7. The first brief report (E/CN.4/Sub.2/1990/34) looked at the treaties and other instruments defining the attributes of the right to a fair trial that are the most protective of the right. For example, the first brief report identified the principal treaties containing provisions on the right to a fair trial, including the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention on Human Rights; the four Geneva Conventions for the Protection of Victims of War of 1949; and the two Additional Protocols of 1977 to the Geneva Conventions of 1949.

8. The first brief report also discusses other instruments with provisions on the right to a fair trial: the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man; the Basic Principles on the Independence of the Judiciary; the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; the Standard Minimum Rules for the Treatment of Prisoners; the Code of Conduct for Law Enforcement; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees on the detention of refugees and asylum-seekers; and the Concluding Document of the Vienna Follow-up Meeting of the Conference on Security and Cooperation in Europe.

9. Further, the first report excerpts the General Comments of the Human Rights Committee on articles of the International Covenant on Civil and Political Rights relevant to the right to a fair trial.

10. The first report was discussed at the forty-second session of the Sub-Commission and several useful comments were received. Sub-Commission members suggested that certain aspects of the right to a fair trial, for example, the right to petition for habeas corpus, should be made non-derogable even during periods of emergency. Other members noted the need for fair trial standards to apply to military courts, emergency courts, other special tribunals, administrative procedures, and similar proceedings. One member questioned whether there could ever be a fair trial in abstentia. Another member drew attention to the importance of the requirement of a "public hearing" and queried whether it was desirable to allow television, radio, and photographic coverage in courtrooms. It was suggested that the two rapporteurs should consider not only which attributes of the right to a fair trial ought to be made non-derogable, but also whether a model code for the right to a fair trial could be developed. Those comments should be reflected in the present second report, the questionnaire prepared by the rapporteurs, and/or the final report.

11. The comments at the forty-second session gave rise to a few specific corrections to the first brief report and which will eventually be reflected in the final report. In paragraph 37 of the first report (E/CN.4/Sub.2/1990/34),

the fourth sentence should read, "Impartiality also indicates the appropriate attitude of the court to the case being tried and that there will be an unbiased assessment of the evidence.".

12. One member of the Sub-Commission questioned whether the Nuremberg and Tokyo Tribunals should have been cited in paragraph 30 of the first report as examples of "international courts dealing with cases related to human rights". The rapporteurs agree that the principles related to a fair trial should be applied to such post-war military tribunals.

13. A member of the Sub-Commission correctly suggested that paragraphs 56 and 94 should be made consistent in referring to evidence obtained by illegal means.

14. One member of the Sub-Commission suggested that the rapporteurs should in future reports include the provisions of national legislation and practices in regard to the right to a fair trial. The rapporteurs drafted a questionnaire to seek information on national legislation, decisions and practices, so that they can eventually be incorporated in the study. It was also suggested in the Working Group on Detention that the rapporteurs should develop model national legislation or principles for such legislation as part of their study on the right to a fair trial. (See, e.g. document E/CN.4/Sub.2/1990/32, para. 25). The rapporteurs intend to pursue those suggestions after they have amassed adequate information on national legislation and practice.

15. In other respects, the discussion at the Sub-Commission was either reflected in the resolution adopted by the Sub-Commission recommending that a comprehensive study should be undertaken by the two Special Rapporteurs, or will be reflected in this preliminary report and/or in later reports as information becomes available.

II. NEW SOURCES OF THE RIGHT TO A FAIR TRIAL, NORMS AND TENDENCIES OF THEIR DEVELOPMENT

16. On 2 September 1990 the Convention on the Rights of the Child came into force; the Convention contains several provisions relevant to the right to a fair trial for children.

17. In September 1990 the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Basic Principles on the Role of Lawyers, Guidelines on the Role of Prosecutors, Principles [on] Pre-trial Detention, and Rules for the Protection of Juveniles Deprived of their Liberty. (See document A/CONF.144/28), by its resolution 45/166 of 18 December 1990, the General Assembly, inter alia, welcomed those standards which were relevant to the right to a fair trial.

18. On 5 March 1991 the Commission on Human Rights adopted resolution 1991/42 recommending to the Economic and Social Council the establishment of a "working group composed of five independent experts, with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards ...". The working group's investigations may help interpret fair trial standards in cases in which persons are arbitrarily detained.

19. On 5 March 1991 the Commission on Human Rights also adopted resolution 1991/39 endorsing the decision of the Sub-Commission to entrust Mr. Louis Joinet with the preparation of a report on strengthening the independence of the judiciary and the protection of practising lawyers. There may be some overlap between the present study on the right to a fair trial and the report on the independence of the judiciary. Further, the Working Group on Detention at its 1990 session agreed to ask Mr. John Carey and Mr. Edwardo Suescún Monroy to prepare a working paper on habeas corpus and amparo as non-derogable rights. The respective members of the Sub-Commission will need to coordinate their efforts.

20. In June 1990 the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe adopted a document containing several provisions relating to the right to a fair trial. The Charter of Paris for a New Europe issued in November 1990 pursuant to a meeting of the Conference on Security and Cooperation in Europe states that everyone has the right "to know and act upon his rights [and] to fair and public trial if charged with an offence ...". The Charter also provides, "We will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights.".

III. INTERPRETATIONS OF INTERNATIONAL FAIR TRIAL NORMS

21. The right to a fair trial has been a norm of international human rights law for over 40 years and a substantial body of interpretation has developed elaborating and construing this right, but relatively little research has been undertaken to analyse the developing content of the right. The three principal sources of interpretation of the right to a fair trial have been the Human Rights Committee, the European Commission and Court of Human Rights, and the Inter-American Commission on and Court of Human Rights. This part of the present second report provides an initial summary of the interpretation of the right to a fair trial in the decisions of the Human Rights Committee. The two rapporteurs expect to prepare summaries of the European and Inter-American materials for their next report.

22. The International Covenant on Civil and Political Rights grants basic fair trial rights to individuals in both civil and criminal proceedings. The rights guaranteed at the various stages of the pre-trial and trial process vary in civil and criminal proceedings. The preliminary report prepared for the forty-second session of the Sub-Commission (E/CN.4/Sub.2/1990/34) discusses the provisions of the international Covenant on Civil and Political Rights and the General comments on the right to a fair trial issued by the Human Rights Committee. This part of the present report recounts the interpretations which the Human Rights Committee has given in its decisions on individual cases concerning provisions on the right to fair trial in the International Covenant.

23. The first section of this part of the present report discusses the rights extended to persons who have been arrested and those who have been detained in criminal and non-criminal proceedings. The second section covers the rights protecting any person held in detention. The third section focuses on the right to notice for any person arrested or detained on a criminal charge. The fourth section deals with the right to release pending trial. The fifth section examines the right to counsel. The sixth section describes the rights protecting an accused during the hearing or trial. The seventh section discusses rights which ensure a fair decision and includes the rights of persons in civil proceedings. The eighth section considers the right to appeal. The ninth section covers the right to a remedy.

A. Arrest and detention

24. Article 9 (1) of the International Covenant on Civil and Political Rights prohibits arbitrary detention and declares that detention must be in accordance with procedures established by law.

1. Prompt review of detention required

25. Article 9 (3) provides that anyone arrested or detained on a criminal charge has the right to be brought promptly before a judge or authorized judicial officer. The Committee considered the case of several Bolivians arrested and detained on suspicion of being guerrileros. Military authorities held the group incommunicado for 44 days before their first hearing in a military court. The Committee found the 44-day detention violated their right under article 9 (3) to be brought promptly before a judge. 1/

2. The court must have legal authority over detainees

26. It is implicit in article 9 (3) that the judge or officer exercising judicial control has legal authority over the detainee. In the case of the Bolivian civilians detained for 44 days before being heard by a military court, the Committee found that the military lacked jurisdiction over the civilians and that the detainees should have been brought promptly before a civilian judge. 2/

3. Right to habeas corpus

27. Under article 9 (4) any individual arrested or put in detention has the right to an immediate determination of the lawfulness of his/her detention. Article 9 (4) protects individuals detained in non-criminal cases. The Committee examined the case of a Finnish serviceman sanctioned with 10 days of detention in a military disciplinary proceeding. The Committee held that article 9 (4) applies to all cases of detention, including decisions of an administrative body or authority and that the serviceman was entitled to review in a court of a law. 3/

4. No suspension of the right to habeas corpus

28. The Committee disfavours any suspension of the right to habeas corpus. The Committee found that detention of a Uruguayan union official during a time of "prompt security measures" when habeas corpus was inoperative, violated article 9 (4) because the detainee had no recourse to habeas corpus. 4/

B. Treatment during pre-trial detention and imprisonment

29. Article 7 prohibits torture and cruel, inhuman, or degrading treatment or punishment, and applies to the pre-trial period as well as other periods of detention. Article 10 provides that all persons deprived of their liberty shall be treated with humanity and respect.

1. Prohibited treatment

30. Prolonged judicial proceedings could constitute cruel, inhuman, or degrading treatment or punishment. The Committee found that although excessive delays in judicial proceedings are not per se cruel, inhuman, or degrading treatment, the situation in each case must be considered. In capital cases prolonged judicial proceedings may constitute cruel, inhuman, or degrading treatment or punishment.

31. A wwarrant of execution causes intense anguish to the individual concerned and a delay in proceedings regarding the warrant may constitute cruel, inhuman, or degrading treatment. Two men under a death warrant were granted a stay of execution 45 minutes before the scheduled time of execution. Authorities kept the men in their death cell for 20 hours after the stay was granted. The Committee held that the delay in removing the men constituted cruel and inhuman treatment within the meaning of article 7. 5/

32. A detainee's rights under article 10 include the right to adequate medical care during detention and extend to persons under a sentence of death. The Committee considered allegations of a prisoner on deathrow that he was denied necessary ophthalmologic and dental treatment. The Committee found insufficient facts to decide the issue but affirmed that a person imprisoned under a death sentence cannot be denied medical treatment. 6/

33. No prisoner can be subjected to compulsory experimentation while in detention or prison. A Uruguayan journalist was sentenced to seven years imprisonment for subversive association with an opposition political party. While in prison, the author was subjected to psychiatric experiments. For three years he was injected against his will with tranquillizers every two weeks. When he refused, he was forcibly subdued, injected with the drug, and subsequently held incommunicado in a punishment cell for 45 days. The Committee found that the treatment constituted inhuman treatment and violated articles 7 and 10 (1). 7/

2. Prolonged incommunicado detention prohibited

34. Holding an individual incommunicado for a substantial period is a form of ill-treatment and violates article 10. The Committee examined the case of a Uruguayan student detained 14 months for subversive association. 8/ She was kept incommunicado for 15 days and was subjected to beatings and other acts of torture during her detention. The Committee found the detention violated two provisions. The torture and cruel and degrading treatment she received while being kept incommunicado constituted a violation of article 7. The 15 days of incommunicado detention violated her right to humane treatment under article 10. 9/ In another case where a man was detained incommunicado for six weeks, the Committee again found two violations. First, it found that the incommunicado detention was "incompatible with the standard of humane treatment required by article 10 (1)". 10/ In addition, it found the detention deprived him of his right to counsel. 11/

3. Right to correspond with and to see family

35. The standard of humane treatment requires that prisoners be allowed to communicate with family and friends by correspondence as well as by receiving visits. In Estrella v. Uruguay, 12/ the Committee determined that the restrictions on correspondence and visits by prison authorities constituted inhumane prison conditions in violation of article 10 (1). Prison authorities can exercise measures of control and censorship over prisoners' correspondence. The restrictions, however, are subject to article 17 which prohibits arbitrary or unlawful interference with a person's correspondence. In addition, restrictions must be consistent with the standard of humane treatment of detained persons.

36. A prisoner or detainee has the right to write and receive correspondence. In Estrella a prisoner in a Uruguayan prison was denied mail for a seven-month period. Prison authorities also subjected his correspondence to several restrictions. Authorities censored and arbitrarily deleted sentences in his correspondence, prohibited letters to lawyers or international organizations, and refused to dispatch letters. The Committee found that authorities had no

reasonable basis to deny a prisoner the right to correspond. The Committee held that prisoners and detainees have the right to correspond with their family and reputable friends at regular intervals.

37. Arbitrary restrictions on visits also violate the right to humane treatment. In Estrella, prison officials allowed only two 45-minute visits per month, taped all conversations, restricted topics of conversation, and could arbitrarily end any visit. The Committee found that a detainee has the right to receive visits at regular intervals under necessary supervision and that the conditions of Estrella's detention violated article 10 (1).

C. Notice

38. article 14 (3) (a) provides that everyone charged with a criminal offence has the right to be informed promptly, in detail, and in a language she/he understands, of the nature and cause of the charge.

1. Notice of charges must be timely

39. The notice must allow sufficient time to prepare a defence. The Committee found that a summons issued three days before the start of trial did not provide sufficient notice. 13/ The Committee stated that the purpose of notice was to inform the accused in a manner which would allow him/her to prepare a defence. Three days prevented any effective preparation of a defence. In addition, the notice must comply with all the requirements of article 14 (3) (a). Notice must be provided in time to allow the accused sufficient opportunity to examine or have examined the witnesses against him/her and obtain the attendance and examination of witnesses on his/her behalf.

40. Article 9 (2) provides that anyone arrested shall be informed at the time of the arrest of the reasons and any charges. The Committee insists upon strict compliance with the promptness requirement in article 9 (2). The Committee found that detaining a lawyer for a Dominican Republic human rights organization for 50 hours without informing the lawyer of the reasons for his arrest violated article 9 (2). 14/ Not surprisingly, the Committee found that a Uruguayan trade union official detained by Uruguayan authorities for over two years without being informed of the charges against him was also in violation of article 9 (2). 15/

2. Detailed notice of charges required

41. The Committee found that the function of the notice requirement was to enable a person to take immediate steps to secure release if she/he believes the reasons are invalid. The Committee held that this purpose requires that the notice include details of the charges. 16/ Where an individual was arrested and told the arrest came under "prompt security measures", the Committee determined that he was not given sufficient detail to indicate the substance of the complaint against him. 17/

42. In addition to detailed notice of the charges or applicable law, the Committee found that there must be sufficient evidence to show that the detention falls within the law. A Malagasy political opposition leader was

placed under house arrest on the basis of a law relating to the dissolution of certain associations. The detainee claimed that he was being held for his political beliefs and for having charged the Government with election fraud. The Committee found that government authorities failed to show that his arrest came within the law cited for his arrest. Furthermore, the arrest appeared to be on account of his political opinions, and violated article 9 (1). 18/

D. Right to release pending trial

43. Article 9 (3) provides that those detained or arrested on a criminal charge have the right to trial within a reasonable time or release. Detention of a person in custody must not only be lawful but reasonable and necessary in the circumstances. 19/ The Committee examined the court-ordered detention of a lawyer who refused to cooperate in an investigation of his clients on the basis of lawyer-client privilege. The Netherlands argued that his nine-week detention was lawful and therefore did not violate article 9. The Committee found that detention "must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability". 20/ The lawyer was being held in custody to ensure his accessibility for authorities carrying out a criminal investigation. The Committee found that the lawyer was not obliged to provide such cooperation; hence, the detention was neither necessary nor reasonable and violated article 9 (4).

44. The Committee narrowly interprets the "necessity" requirement which justifies continued pre-trial custody. Custody may be necessary "to prevent flight, interference with evidence or the recurrence of crime". 21/ The accused may be detained "where the person concerned constitutes a clear and serious threat to society which cannot be contained by any other manner". 22/

45. The Committee held that suspicion of murder alone did not demonstrate a sufficient interest to justify pre-trial detention. An individual arrested in Ecuador for murder was detained for five years before indictment. 23/ The Committee recognized that article 9 (3) allows legal authorities to hold a person in custody if it is necessary to assure that the accused appears at trial. The Ecuadorian authorities expressed no concerns about the reappearance of the suspect. Absent an explanation for detaining the suspect without bail, the Committee found that the suspect must be granted a prompt trial or released.

46. An incomplete criminal investigation does not justify keeping an individual in detention. Ecuadorian authorities argued that the detention was not prolonged because the pre-trial investigation was completed just prior to indictment. 24/ The Committee held that the entire trial must be complete to satisfy the prompt trial requirement. A completed trial produces a final judgement; because an indictment is not a final judgement, the detainee is entitled to release.

E. Counsel

47. Article 14 (3) (d) provides that an accused has the right to defend him/herself in person or through legal assistance of his/her own choosing.

1. Right to select counsel

48. The accused's right to choose his/her own counsel requires that she/he have an opportunity to choose freely. Concert pianist Estrella was arrested and brought before a military court in Uruguay; he was forced to choose his defence from two lawyers officially appointed by the military. 25/ The Committee found that Estrella did not, in effect, have a choice when forced to pick from two lawyers pre-selected by the military. In the case of another Uruguayan accused who was forced to choose a lawyer from a list of military lawyers, the Committee held that the accused's right under article 14 (3) (d) was violated. 26/

49. A court cannot assign a lawyer for an accused when counsel of his own choosing is available. A journalist in Uruguay charged with subversive association was sentenced by a military tribunal to seven years' imprisonment. The following year he was brought before the Supreme Military Tribunal on charges of conspiracy, possession of arms, and use of false papers. The two lawyers who defended him during his previous trial had to renounce his defence and later left the country. Although he had found another civilian lawyer who would defend him, he was forced to accept a military ex officio counsel. The Committee held that the court could not prevent a qualified lawyer selected by the accused from representing him. 27/

2. Right to appointed counsel in capital cases

50. Article 14 (3) (d) provides that a person charged with a criminal offence has the right "to have legal assistance assigned to him, in any case where the interests of justice so require". The Committee found that a Norwegian driver charged with speeding and tried at the same time for an unrelated offence concerning the failure to provide information to an official register about a business firm did not demonstrate that the interests of justice required the assistance of a lawyer. It held that the State did not violate article 14 (3) (d) by failing to provide him with free legal assistance. 28/

51. The Committee has observed that cases involving a death sentence clearly require counsel in the interests of justice. In Robinson v. Jamaica, 29/ a man arrested and charged with murder arranged for two lawyers to undertake his defence. The first day of trial the lawyers did not appear, but the judge allowed the trial to proceed. On the following day one of the lawyers appeared and requested permission for both lawyers to withdraw from the case. The judge denied permission and asked the two lawyers to represent the accused through legal aid. When counsel refused the request, the judge continued the trial with the accused unrepresented. The Committee found that the accused's right to counsel in a capital case was violated. It held that even where the unavailability of counsel was partially attributable to the accused, the court must accommodate the right to counsel and, if necessary, adjourn the proceedings. The assistance of a trial judge does not eliminate the accused's right to counsel.

52. An accused in a capital case has the right to legal representation and to choose his own legal representation at the trial and appellate levels. 30/ Legal representation appointed to defend a man on trial for murder in Trinidad and Tobago displayed no interest in the case, remained passive throughout the

trial, and failed to challenge evidence presented by the prosecution. After the accused was convicted and sentenced to death, he initiated an appeal. The accused did not want the attorney to represent him on appeal. Although he arranged for different representation and informed the court of his new defence attorney, the court of appeals reappointed his old lawyer. The Committee found that under the circumstances and especially because the case involved the death penalty, the State should have accepted the appellant's choice even if it required an adjournment of the proceedings. The Committee maintained that in capital cases legal assistance must be provided in ways that adequately and effectively ensure justice and that the appellant's right under article 14 (3) (d) was violated because he was denied effective representation during appeal.

53. The accused in a capital case may contest the choice of his court-appointed lawyer. A Jamaican convicted of murder appealed his case. 31/ The court-appointed attorney assigned to him for the appeal, the same one who represented him in the trial court, informed the accused that there was no merit to the appeal. The accused requested a new attorney and requested to be present in person at the appeal. The court did not assign a new lawyer and did not allow him to be present since legal aid counsel had been assigned to him. The attorney did not advance arguments in favour of the appeal being granted and it was dismissed. The Committee found that the accused was effectively without legal representation in violation of article 14 (3) (d) and should have had another lawyer appointed for his defence or been allowed to represent himself at the appeal proceeding.

3. Right to adequate counsel

54. Where legal representation is provided, the person must be qualified to represent and defend the accused. A medical student detained in Uruguay was charged with being a member of a clandestine opposition group and was brought before a military court. The military court appointed a colonel as her defence counsel even though he was not a lawyer. The Committee found that the accused did not have adequate legal assistance and the appointment of unqualified counsel violated her rights under article 14 (3) (b) and (d). 32/

55. If legal representation is provided, the lawyer must actually advocate in favour of the accused. The officially appointed lawyer representing the accused pianist, Estrella, questioned his innocence, stressing confessions from friends. 33/ The lawyer failed to arrange an examination of Estrella's accusers. The Committee held that Estrella's lawyer did not provide an adequate defence in violation of article 14 (3) (d). 34/

56. A lawyer's exercise of professional judgement in preparing his/her client's defence does not violate the accused's right to adequate representation even if the advice turns out to be incorrect. In a murder trial in Jamaica the court closed the case before the defence presented one of its witnesses. The accused claimed that the witness could have provided him with an alibi and that his lawyer, provided by the State, failed to afford an adequate defence by not calling the witness. The Committee noted that it is not unusual for the accused to believe that he would have been better represented by counsel of his own choosing, than by counsel provided by the

State; but where the accused avails himself of legal representation provided by the State, he cannot claim inadequate representation simply because other counsel might have conducted the trial differently. 35/

57. Where an accused has legal representation, authorities may not try a person without notifying his/her attorney of the proceedings in time to allow adequate preparation for the defence. A military court tried a Uruguayan on charges of subversive association without notifying his attorney. After he was convicted the court informed the attorney of the results. The Committee held that failing to notify defence counsel barred the lawyer from participating in the defence and violated article 14 (3) (b) and (d). 36/

4. Opportunity to prepare a defence

58. The accused has the right under article 14 (3) (b) to communicate with counsel and have adequate facilities for the preparation of his/her defence. Actions taken by government authorities which deny an attorney the opportunity and adequate time to communicate with the accused violate article 14 (b) and (d) of the Covenant.

59. Marais, a South African national, and Wright, a United States citizen, made an emergency landing in Madagascar and were arrested. They were convicted of overflying Madagascar without authority and were sentenced to five years in prison. Marais escaped, was rearrested, and was charged with escaping from prison. Malagasy authorities created circumstances which made it difficult or impossible for Marais to speak with his attorney. After Marais' attorney left Madagascar, he was refused re-entry upon return. Marais retained a new attorney but during the 18 months Marais spent in detention awaiting trial, he was allowed to meet with his attorney only twice. After an initial hearing, authorities moved Marais to a political prison where all communication was forbidden. Malagasy political police eventually arrested Marais' attorney, detained him, and expelled him from Madagascar. The Committee found that Marais was not provided with conditions that allowed him to exercise his right to counsel effectively and that the Malagasy authorities' interference violated articles 14 (3) (b) and (d). 37/

60. Incommunicado pre-trial detention for a prolonged period violates the accused's right to prepare his/her defence and is prohibited. The Committee found that holding a detainee incommunicado for six weeks after his arrest deprived him of the possibility of communicating with counsel at a critical pre-trial stage and was prohibited. 38/

61. An accused held in detention may not be prevented from seeing his/her attorney for an extended period. A Uruguayan indicted by a military tribunal in January 1973 was not allowed to see his defence lawyer for two years from March 1975 to mid-1977. He was sentenced in 1979. The Committee found that denying the accused the right to see his attorney for two years violated the accused's right under articles 14 (3) (b). 39/ The Committee's decision suggests that the accused had a right to see an attorney at all times during the pre-trial period.

62. The accused must be given sufficient minimum time to prepare a defence. A Jamaican accused of murder was provided with a legal-aid attorney but was not able to communicate with the attorney until the opening day of trial. 40/ The lawyer had not discussed the case with the accused nor had time to prepare questions to ask the witnesses, and requested a postponement which the judge denied. The Committee found that the court's failure to grant the defence sufficient minimum time to prepare his examination of witnesses constituted a violation of article 14 (3) (b).

63. The right to prepare a defence includes the right to private communication with counsel. A Uruguayan awaiting trial on charges of subversive association was permitted to speak with her defence lawyer through a glass wall only over the prison's telephone and while guards stood at their side. Although the Committee found that the accused's rights appeared to be violated, it was procedurally barred from ruling on the issue because the facts were disputed by the State party. 41/

F. Hearing

1. Right to prompt trial

64. Article 9 (4) provides that anyone deprived of his/her liberty by arrest or detention is entitled to have a court decide without undue delay on the lawfulness of the detention. The Committee recognized that it is not useful to set precise deadlines for issuing a judgement. 42/ Instead, the Committee has assessed the timeliness of decisions on a case-by-case basis. The Committee held that a seven-day detention which did not provide the detainee with an opportunity to bring his detention before a court violated article 9 (4). A Spanish citizen in Finland requested asylum and was placed in detention under the Finnish Aliens Act. The law provided him with a right to request review of his detention by the Minister of Interior after seven days. The Committee found that the detention violated his rights under article 9 (4) because he was not allowed to take proceedings and obtain a court decision promptly.

65. In the same case the Committee found that a three-month delay between the filing of the detainee's appeal and the decision on the appeal was "in principle too extended". 43/ The Committee, however, noted that it lacked facts necessary to evaluate the reason for the delay and could not make any findings on the issue.

66. Article 14 (3) (c) guarantees an individual charged with a criminal offence the right to a trial without undue delay. The cases under this provision indicate that the right to trial without undue delay must be understood as the right to a trial which produces a final judgement and sentence without undue delay. 44/ The founder of an alleged guerilla group in Uruguay was indicted on charges of subversion, storage of explosives, and manslaughter. It was not until six years later that a military tribunal sentenced him to 30 years' imprisonment. The Committee held that he was tried with undue delay. 45/

67. The right to be tried without undue delay includes the right to a review of conviction and sentence without undue delay. Two Jamaican men took an appeal of a murder conviction and death sentence which was rejected by the appellate court. The court's opinion stating the reasons for rejecting the appeal was not issued until nearly four years later. The two could not petition for special leave to appeal to a higher tribunal until they received the opinion of the appellate court. The Committee noted that articles 14 (3) (c) and 14 (5) must be read together so that the right to review of conviction and sentence is made available without undue delay. 46/ In another case an appeal was delayed for 34 months because of an administrative failure to produce the trial transcripts. The State argued that the accused should have requested an order to produce the transcripts. The Committee rejected the State's argument and found that the undue delay in the appeal violated the accused's rights under article 14 (3) (c). 47/

68. The State has the responsibility to see that the entire process is completed without delay. The State in Pratt and Morgan v. Jamaica argued that the delay in proceedings was due to an oversight by the judge and that there was no violation of the right to trial without undue delay because the accused had a responsibility to assert his right to the judgement which he failed to exercise. The Committee found that the right to a prompt trial does not depend upon the accused's request that the right be observed.

69. Article (9) (3) provides that anyone arrested or detained on a criminal charge must be tried within a reasonable time or released. The Committee considered the case of a Venezuelan detained on suspicion of participating in an armed rebellion and indicted 10 months later by a military court. Two years after the indictment the proceedings were interrupted, but the detainee remained in detention. He was released five years later. The Committee found that absent a final judgement in the case the detention violated article 9 (3). 48/

2. Equality of arms

70. Article 14 (1) declares that all persons shall be equal before the courts and tribunals. Although this provision applies equally to individuals in civil and criminal proceedings, the Committee has not had an opportunity to apply it to a civil proceeding.

71. The right of all persons to be equal before the courts requires that the prosecution and defence be treated equally in a criminal trial. The court cannot act in a way which gives the prosecution an advantage over the defence. The Committee considered a case where the accused's request for adjournment in a murder trial was denied by the trial court. Prior to the accused man's request for adjournment, the court had postponed the trial on seven occasions because the prosecution could not find the address of or subpoena its chief witness. On the day the trial commenced, the two lawyers for the accused did not appear and on the following day they withdrew from the case. The accused requested adjournment to arrange legal representation and the trial judge refused. The Committee found that the refusal raised issues of fairness and violated article 14 (1) because of the "inequality of arms" between the parties. 49/

3. Right to interpretation

72. Article 14 (3) (f) provides the accused with the right to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court. The Committee found that this provision does not imply that the accused has the right to express him/herself in the language which he/she normally speaks or speaks with most ease if the accused is sufficiently proficient in the court's language. 50/ A French citizen whose mother tongue was Breton was charged with defacing road signs in French and tried in a French court. The accused requested that the court allow him and his witnesses to give their testimony in Breton. The court noted that the accused was able to express himself in French and that his witnesses understood and spoke French, although they preferred to speak in Breton. The court denied the accused's request for an interpreter and to speak in Breton and conducted the trial in French. The accused alleged that denying him the right to express himself in his mother tongue violated his right to a fair trial. The Committee noted that article 14 (1) ensures procedural equality and the equality of arms in criminal proc edings. The Committee found that this provision, however, does not prevent a State from using one official court language. Under this provision a State is not obligated to provide an interpreter for a citizen whose mother tongue differs from the official court language. The State is obligated to provide an interpreter under article 14 (3) (f) if the accused or the defence witnesses have difficulty understanding or expressing themselves in the court language. 51/ The Committee concluded that denying the accused the right to speak in Breton, when he understood and spoke French, did not violate his right to a fair trial or his rights under article 14 (3) (f).

4. Right to be present at trial

73. Article 14 (3) (d) provides the accused with a right to be tried in his/her presence. A Uruguayan profession, Hiber Conteris, charged with subverting the constitution, "criminal and political association", illegal entry, and kidnapping, was denied any opportunity to appear in person before a judge. He was convicted by a military tribunal *in absentia*. On appeal, he was not brought before members of the military tribunal reviewing his case but instead "a junior functionary confined himself to reading the sentence and asking for my signature". 52/ The Committee found that both trial and appeal denied his right to a public trial in violation of article 14 (1).

74. Another Uruguayan tried by military courts challenged the fairness of a military procedure which permitted the accused to submit only written statements taken by a court clerk and did not allow her to be brought before the judge in person. Although the Committee could not rule on the issue, it supported the accused's right to appear in person before the court. 53/

75. The Committee held that the right to a public trial does not forbid all proceedings *in absentia*. The Committee stated that proceedings *in absentia* may be permissible in the proper administration of justice, for example, when the accused person has been informed of the proceedings sufficiently in advance and declines to exercise the right to be present. 54/ According to the Committee, a valid judgement *in absentia* requires that steps be taken to

inform the accused beforehand about the proceedings against him/her, especially the requirements of article 14 (3) (a). The Committee found that the purpose of the notice was to allow the accused an opportunity to exercise his/her rights under article 14 effectively. To satisfy this purpose, the notice must inform the accused of the date and place of trial and request his/her attendance. 55/

76. The Committee considered the case of a Zairian citizen living in Belgium as a political refugee who was sentenced to death for murder in two separate trials made known to him only through the press. The Committee acknowledged that although there are certain limits on the efforts authorities may be expected to make in contacting the accused, the State had not reached those limits in the case of the Zairian citizen. 56/ Judicial authorities had issued summonses but did not attempt to send them to the accused even though his address was known. The Committee held that the trial violated his right under article 14 (3) (d).

5. Right not to be compelled to confess guilt

77. The Committee held that a confession obtained after ill-treatment violated the accused's right not to be compelled to confess guilt under article 14 (3) (g). Professor Conteris was arrested by security police for crimes associated with subverting the constitution and spent three months in incommunicado detention; he was subjected to various forms of torture, and eventually signed a confession. 57/ The Committee held that he did not voluntarily sign the confession and that a forced confession violated article 14 (3) (g). 58/

6. Right to call and examine witnesses

78. The accused's right to obtain the attendance and examination of witnesses on his/her behalf under article 14 (3) (e) may be waived by counsel. In Pratt and Morgan v. Jamaica two men convicted for murder and sentenced to be executed argued that the judge improperly closed the case before an important defence witness was allowed to provide an alibi for one of the accused. The Committee found that the defence attorney did not call the witness because of tactical considerations. The accused argued that his counsel should have insisted upon calling the witness, and failing to do so constituted a violation of article 14 (3) (e). The Committee held that counsel's decision not to call the witness was within the professional judgement of the attorney and not a denial of the accused's right to call and examine witnesses.

7. Civil suits entitled to protection

79. Under article 14 (1) any individual in a suit at law is entitled to a fair hearing. The Committee found an action is a suit at law in two circumstances: if the forum where the particular question is adjudicated is one where courts normally exercise control over the proceedings; or where the right in question is subject to judicial control or judicial review. The Committee held that a Canadian denied a disability pension by the Canadian Pension Commission had the right to a fair hearing under article 14 (1). 59/

The Committee found that because Canadian law allowed the individual to appeal the decision to the federal court, even though the individual did not appeal it, the decision was subject to judicial supervision and control; therefore he was engaged in a suit at law under article 14 (1).

80. Immigration hearings and deportation proceedings may be suits at law. The Committee considered a Salvadorian's claim that Canada violated his right to a fair hearing in deportation proceedings. Canada argued that deportation proceedings were not suits at law and thus not subject to article 14 (1). The Committee did not accept Canada's argument and stated explicitly that such proceedings were suits at law. It held that even if immigration and deportation proceedings were within the meaning of article 14 (1), however, the Salvadorian failed to establish any violation. 60/

8. Limitation on derogability of rights in the trial process

81. The Committee held that a State cannot derogate from due process guarantees by invoking "prompt security measures" without explaining the national emergency situation and the specific derogations required by the situation. 61/

82. The Committee considered violations of articles 14 (1), 14 (2), and 14 (3) in the case of two Uruguayan nationals who were detained, tried by a military judge, and sentenced under "prompt security measures". The Government argued that the two received all guarantees of due process and that the derogations were justified under the country's "prompt security measures". Article 4 allows States in times of public emergency which threaten the life of the nation to derogate from their obligations under the Covenant. The derogations, however, can only be made to the extent strictly necessary by the exigencies of the situation. The Committee found that a legislative enactment of emergency laws was not sufficient to permit derogation. Article 4 allows derogation only in "strictly defined circumstances" and "prompt securities measures" did not justify derogation. In conclusion, the Committee held that the trial violated articles 14 (1), 14 (2), and 14 (3) because they were tried in circumstances in which "irrespective of legislative provisions" they could not effectively enjoy the safeguards of fair trial. 62/

83. In another case security forces arrested a Uruguayan without a warrant. The Committee found that arresting and detaining him without a warrant could not be excused by the "prompt security measures" and that his detention violated article 9 (1). 63/ The Committee held that charges brought after arrest and detention did not make the detention lawful. 64/

84. A Colombian law enacted under a state of siege allowed members of the police to escape prosecution for crimes intended to prevent or curb extortion, kidnapping, or drug trafficking. 65/ Police raided a house looking for alleged kidnappers, waited in hiding for the suspects, and subsequently shot and killed seven individuals who entered. The police involved were charged and then acquitted under the special Colombian law. The Committee found that even if an effective derogation under article 4 was assumed, the Colombian law could not come within the derogation to exonerate the police action. The Committee noted that the individuals killed were only suspects in a kidnapping

and held that their killing had deprived them of due process. In addition, article 6 (1) provides that the right to life shall be protected by law and that this article cannot be the subject of derogation under any circumstances. The Committee's opinion suggests that a State cannot derogate from its right to guarantee due process protection especially when the life of the individual is at stake.

G. Decision

85. Article 14 (1) provides all persons in criminal trials and civil suits the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law.

1. Right to an independent judiciary

86. Several communications have challenged the competency, independence, and authority of a military court under article 14 (1), however, the Committee has not ruled on the issue. In each case the person alleging the violation was still in detention controlled by the military. 66/

87. Article 9 (4) provides that any person deprived of his liberty by arrest or detention has the right to bring proceedings before a court.

88. The Committee holds that an authority is not a "court" simply because it reviews detention according to established legal procedures. The body conducting the review must be a court of law. The Committee found that a military disciplinary proceeding and a military appeal process did not constitute a court within the meaning of article 9 (4). The Committee examined the case of a Finnish serviceman sanctioned with 10 days of detention in a military proceeding. The serviceman was allowed to request a review by a superior military officer. 67/ Finland argued that since military disciplinary detention was regulated by law, it did not require the legal or procedural safeguards stipulated in article 9 (4). The Committee disagreed. The purpose of article 9 (4) is not to ensure that detention is reviewed in a judicial or quasi-judicial manner or that judicial scrutiny is provided on appeal. Its purpose is to ensure that a court reviews the detention. The Committee held that a supervisory military officer is not a "court" within the meaning of article 9 (4). 68/

89. The court reviewing the legality of detention must be objective and independent. The Committee considered a Spanish citizen's claim that he had no recourse to a court to challenge his detention in Finland. The Spanish citizen had requested asylum in Finland and was detained under the Finnish Aliens Act. Under the Act a detained alien may appeal his/her detention to the Minister of Interior. Finland argued that the law and appeal process protected aliens against unlawful detention thus satisfying the purpose of article 9 (4). The Committee declared that the purpose of requiring review by a court is to ensure "a higher degree of objectivity and independence" in exercising control over detention. 69/ The Committee held that the Minister of Interior could not review the detention with the necessary objectivity.

2. Right to a public trial

90. Article 14 (1) provides that the public may be excluded from a trial only for reasons of morals, public order, or national security in a democratic society, or where required by the private lives of the parties. A Uruguayan tried by a military court for conspiracy to subvert the Constitution was sentenced to four and a half years of imprisonment at a trial held in camera. The Committee found that a trial in camera violates article 14 (1) if the State fails to provide a reason for not providing a public trial. 70/

91. Where a party is entitled to a public trial, the court must make information about time and venue of the proceedings available to the public and must provide adequate facilities for the attendance of interested members of the public. 71/

3. Right to have judgement made public

92. Article 14 (1) provides that any judgement rendered in a criminal case or in a suit at law shall be made public except in juvenile proceedings or matrimonial disputes about the guardianship of children. The right to a public judgement requires that any judgement be in writing. The Committee examined the trial of a Uruguayan who was charged with subversive association and sentenced to 14 years' imprisonment but who never received the texts of any court decisions. The Committee found that where the judgement was not in writing, it could not hold that the proceedings or the severity of the sentence complied with the Covenant. 72/ It held that the trial violated article 14 (1) because the judgement rendered against him was not made public.

4. Right to benefit from lighter penalty

93. Article 15 (1) states that if subsequent to the commission of an offence a provision is made for the imposition of a lighter penalty, the lighter penalty shall benefit the offender. The article applies to penalties imposed by civil and administrative bodies as well as those imposed for criminal offences. A Canadian on parole from an eight-year sentence for armed robbery committed an offence and was convicted for that offence. 73/ Under Canadian law, a person convicted of a criminal offence while on parole automatically forfeits the time spent on parole and must re-serve the time in prison. During his imprisonment the criminal law was amended making the revocation of parole a discretionary rather than mandatory sanction. The imprisoned man claimed that Canada, in not making the law retroactive, denied his right to a lighter penalty under article 15.

94. Canada argued that article 15 refers to criminal penalties and that the grant of parole is an administrative sanction which is not included in article 15. The Committee rejected that argument, interpreting "penalty" to include sanctions imposed in administrative and disciplinary proceedings. 74/ The Committee held, however, that he had not been denied the benefit of a lighter sentence and that the judge considered the time he had served when imposing the sentence for the second crime. The Committee questioned whether article 15 (1) requires that a lighter penalty be created prior to the time of

sentencing, or at any time before the sentence is fully served. The Committee disliked the narrow construction which would eliminate the benefit of a lighter penalty for persons in the process of serving a sentence but did not decide the issue.

5. Second trial for same offence prohibited

95. A Uruguayan serving the last year of a 10-year sentence for charges of subversion was brought before a military court and charged on the basis of the same facts used in the first trial. The authorities claimed that there was fresh evidence against the accused and that the new charges were not brought in the first trial. The Committee found that absent a judgement in the second trial, it could not hold that article 14 (7) was violated. It did note that more detail was required to establish that the facts and evidence were, in fact, new and not part of the old trial. 75/

96. An individual may be tried in two separate States for the same offence. A man convicted and sentenced in Switzerland for exchanging money received as ransom for a kidnapping in Italy was later tried and convicted in Italy. The accused argued that article 14 (7) prohibits a second trial for the same offence and should be interpreted broadly to apply to judicial decisions of different States. The Committee rejected this argument, holding that article 14 (7) prohibits only double jeopardy for an offence adjudicated in a given State. 76/

H. Right to appeal

97. Article 14 (5) provides that everyone convicted of a crime shall have the right to review his/her conviction and sentence by a higher tribunal. The Committee held that a charge which involved a one-year sentence was serious enough to come within article 14 (5) and required review by a higher tribunal regardless of whether domestic law viewed it as a "criminal" charge. 77/ A Colombian woman charged with selling a gun was sentenced to one year imprisonment by a military judge. On appeal her sentence was confirmed by the same judge. Colombia argued that a state of siege was in effect in the country which made it necessary to adopt extraordinary legal procedures. The Committee found that the State could not evade its obligations under the Covenant by invoking a state of siege. Although article 4 allows a State to derogate from certain obligations in a time of public emergency, the Committee held that the State must demonstrate that an emergency situation does exist in the country and that the derogation is one permitted by article 4 (1) as strictly required by the situation. The Committee found that the State did not show derogation from article 14 (5) in accordance with article 4 and Colombia violated article 14 (5) by failing to provide an appeal to a higher tribunal.

98. The Committee considered an Italian law removing the right of the President and government ministers to appeal in cases involving certain charges brought before the constitutional court. Italy had submitted a limited reservation under article 4 to give effect to the law. The question arose as to whether an air force general brought before the constitutional court on charges of bribery was denied his right under the Covenant, since his

position was not expressly included in the reservation for the President and his ministers. 78/ The Committee noted that Italian law established a rule permitting an ordinary trial for persons accused of the same crime. The general argued that reading the two provisions together was an expansive interpretation of the reservation and contrary to the generally accepted legal principle of "restrictive" interpretation of reservations. The general claimed that he was a "layman" within the meaning of the provision and his right to appeal should not be limited by the reservation. The Committee disagreed and found that a narrow reading of the restriction, excluding the general, would be contrary to the wording and purpose of the reservation, which was to safeguard provisions in Italian law.

I. Remedies

99. Article 14 (6) provides that a person is entitled to compensation for punishment after a conviction which is reversed or pardoned on the basis of new or newly discovered facts which conclusively show there has been a miscarriage of justice. Muhonen, a Finnish citizen, claimed conscientious objector status and submitted an application to the Military Service Examining Board which was denied. 79/ When he refused military service, criminal court proceedings were initiated and he was sentenced to 11 months' imprisonment. After he had served nearly eight months of his sentence, the Examining Board found that he was entitled to conscientious objector status. He was subsequently pardoned and released from prison. Muhonen claimed that he was entitled to compensation under article 14 (6) because his conviction had been pardoned. The Committee rejected the compensation claim because Muhonen's pardon was not on the basis of new or newly discovered evidence but a resubmitted application for conscientious objector status.

100. Article 2 (3) (a) provides that any person whose rights under the Covenant have been violated shall have an effective remedy. The Committee considered the application of article 2 to the case of a Zairian citizen detained without warrant of arrest for over nine months without leave to test the lawfulness of his detention before a court. While in detention he appealed to an administrateur general and by letter to the head of State, but claimed that no other remedy was available to him under Zairian law. The Committee found a violation of article 2 (3) because there was no effective remedy under the domestic law of Zaire for violations of an individual's rights under articles 9 and 10. 80/

101. The Committee found that a reservation to one of the provisions of the Covenant effectively bars the accused's right to a remedy under article 2 (3) even when the State has not expressly excluded one by reservation. As discussed above, an Italian air force general who lacked the right to appeal his conviction because of Italy's reservation to article 14 (5), maintained that he was entitled to a remedy under article 2 (3) of the Covenant which declares that a person whose rights or freedoms are violated shall have an effective remedy. The Committee held that the right to a remedy is linked to the right violated and cannot be invoked when the purported right is excluded by reservation. 81/

IV. SUMMARY OF INITIAL RESPONSES TO QUESTIONNAIRE

102. The two Special Rapporteurs prepared an initial questionnaire for Governments and that questionnaire was transmitted to Member States, specialized agencies, and non-governmental organizations in mid-April by the Centre for Human Rights with a request for responses and comments, if possible by 31 May 1991. It was recognized by the Special Rapporteurs that the questionnaire requested detailed information and responses could not be prepared either quickly or easily.

103. The questionnaire recognized that such inquiries were time consuming for respondent Governments. Accordingly, the questionnaire contained two parts. In the first part Governments were principally asked to send copies of the relevant codes, rules, regulations, and decisions setting forth procedures in civil courts, criminal courts, emergency/special courts, military courts, and certain administrative processes.

104. If Governments were able to provide more substantive responses, they were requested to consider the questions raised in part II. Here again, it was recognized that answering the questions might be time consuming. Accordingly, Governments were asked to answer only those questions beginning with arabic numbers and which were in bold print. If Governments were able to provide more complete responses, they could answer the questions beginning with small letters and which asked for more detailed information.

105. Even this carefully graduated approach was quite burdensome to Governments - particularly in the short time recommended by the Centre for Human Rights. As at 17 June 1991, the following Governments had responded: Cuba, Finland, Ireland, Panama, Papua New Guinea and Uruguay. Replies were also received from the World Health Organization and the World Bank as well as from the following non-governmental organizations: International Federation Terre des Hommes, Inter-Parliamentary Union, and Regional Council on Human Rights in Asia. Only two Member States were able, in the short time available for preparation of their replies, to submit any substantial information. The Government of Finland presented a brief account of the general policies and principles applicable in this country in regard to the right to a fair trial. The Government of Uruguay submitted complete and detailed responses to the questionnaire. All these replies and other information received will be fully taken into account by the Special Rapporteurs in their future work on the review and analysis of national practices in this field.

106. In the meantime, however, the two Special Rapporteurs would be very grateful for the comments and suggestions of participants in the Sub-Commission session concerning the questionnaire. Having received those comments, the two Special Rapporteurs would endeavour to send the questionnaire once again to Member States. Since the Special Rapporteurs have already received some comments about the original questionnaire, the present report reproduces in annex II a slightly revised questionnaire which takes into account the comments received.

107. Furthermore, the Commission requested in its resolution 1991/43 that questionnaires should be sent to interested specialized agencies and non-governmental organizations. Since specialized agencies and non-governmental organizations have concerns and information relating to more than one country, a slightly modified questionnaire will need to be prepared for their use. Once again the Rapporteurs welcome comments and suggestions on that subject.

V. CONCLUSIONS AND RECOMMENDATIONS

108. Resolution 1991/43 entitled "Right to a fair trial", adopted by the Commission on Human Rights on 5 March 1991, welcomed the brief report (E/CN.4/Sub.2/1990/34) prepared by the two Special Rapporteurs, Mr. Stanislav Chernichenko and Mr. William Treat, and requested them to undertake a more complete study of the right to a fair trial, including the preparation of a questionnaire to Governments and other sources of information.

109. The two Special Rapporteurs have begun their study with a review of the fair trial standards in international instruments and in the interpretations of international bodies, such as the Human Rights Committee.

110. The next, that is, third report of the two Special Rapporteurs will largely be devoted to a review of the interpretations of fair trial standards by the European Commission and Court of Human Rights as well as the Inter-American Commission on and Court of Human Rights.

111. In addition, the two Special Rapporteurs have prepared an initial questionnaire on the right to a fair trial, which they have revised for reproduction in annex II of this report and concerning which they would be very grateful for comments. The two Special Rapporteurs will revise the questionnaire further in the light of the comments received, so that the questionnaire can be sent to Member States again soon after the forty-third session of the Sub-Commission.

112. Furthermore, the questionnaire will be revised for transmittal to interested specialized agencies and non-governmental organizations after the forty-third session of the Sub-Commission.

113. It is hoped that responses to the questionnaires will be received in time for the two Special Rapporteurs to provide the Sub-Commission at its forty-fourth session with an initial summary of the material received and other relevant information on national practices related to the right to a fair trial. Since a review of national practices will be a very time-consuming, difficult, and complex task, however, it is unlikely that the Special Rapporteurs will be able to produce an analysis of national practices until their fourth report for the forty-fifth session of the Sub-Commission.

114. In light of the views of Governments, it would be desirable to consider the preparation of a model code or declaration on the right to a fair trial.

115. In light of the views of Governments, it would also be desirable to consider ways by which the right to a fair trial might be strengthened, for example, by making the right to a fair trial or certain aspects of the right non-derogable. In that regard the study would consider the elaboration of a Third Optional Protocol to the International Covenant on Civil and Political Rights which would add article 14 (the right to a fair trial provision) to the list of provisions which cannot be derogated from in article 4 of the Covenant.

116. Also in light of the views of Governments, it would be desirable to consider other means of strengthening the implementation of the right to a fair trial, as discussed in the first brief report.

117. The two Special Rapporteurs note the task they have undertaken covers a vast and complex subject. The two Special Rapporteurs wish to express their appreciation for the cooperation and assistance they have received in taking the initial steps of the study.

Notes

1/ Peñarrieta et al. v. Bolivia, Selected Decisions of the Human Rights Committee under the Optional Protocol. Volume 2, communication No. 176/1984 (CCPR/C/OP/2), 1990.

2/ Peñarrieta et al. v. Bolivia, Report of the Human Rights Committee. Official Records of the General Assembly, Forty-third session, Supplement No. 40 (A/43/40), annex VII.C (hereinafter Report).

3/ Vuolanne v. Finland, Report. Op. cit., Forty-fourth session (A/44/40), annex X.J; "Although administrative detention may not be objectionable in [certain] circumstances ... the quarantees enshrined in ... article 9 fully apply in such instances.". (Cámpora Schweizer v. Uruguay, Report. Op. cit., Thirty-eighth session (A/38/40), annex VIII).

4/ Caldas v. Uruguay, Report. Ibid., annex XVIII.

5/ Pratt and Morgan v. Jamaica, Report. Op. cit., Forty-fourth session (A/44/40), annex X.F.

6/ Pinto v. Trinidad and Tobago, Report, Op. cit., Forty-fifth session (A/45/40), vol. II, annex IX.H.

7/ Acosta v. Uruguay, Report. Op. cit., Thirty-ninth session (A/39/40), annex XI.

8/ Gilboa v. Uruguay, Report. Op. cit., Forty-first session (A/41/40), annex VIII.B.

9/ Ibid.

10/ Caldas v. Uruguay, Report. Op. cit.

11/ See note 36 infra and accompanying text. See also Muteba v. Zaire, Report. Op. cit., Thirty-ninth session (A/39/40), annex XIII. (Holding a detainee for several months incommunicado violates his right to humane treatment under article 10 (1).)

12/ Estrella v. Uruguay, Report. Op. cit., Thirty-eighth session (A/38/40), annex XII.

13/ Mbenge v. Zaire, Report. Op. cit.

14/ Portorreal v. Dominican Republic, Report. Op. cit., Forty-third session, annex VII.D.

15/ Conteris v. Uruguay, Report. Op. cit., Fortieth session (A/40/40), annex XI.

16/ Caldas v. Uruguay, Report. Op. cit.

17/ Ibid., para. 13.2.

18/ Jaona v. Madagascar, Report. Op. cit., Fortieth session (A/40/40), annex IX.

19/ Van Alphen v. the Netherlands, Report. Op. cit., Forty-fifth session (A/45/40), vol. II, annex IX.M.

20/ Ibid.

21/ Ibid.

22/ Càmpora Schweizer v. Uruguay, Report. Op. cit.

23/ Bolaños v. Ecuador, Report. Op. cit., Forty-fourth session (A/44/40), annex X.I.

24/ Ibid.

25/ Estrella v. Uruguay, Report. Op. cit.

26/ Burgos v. Uruguay, Report. Op. cit., Thirty-sixth session (A/36/40), annex XIX.

27/ Acosta v. Uruguay, Report. Op. cit.

28/ O.F. v. Norway, Report. Op. cit., Fortieth session (A/40/40), Annex XII.

29/ Robinson v. Jamaica, Report. Op. cit., Forty-fourth session (A/44/40), annex X.H.

30/ Pinto v. Trinidad and Tobago, Report. Op. cit.

31/ Reid v. Jamaica, Report. Ibid, annex IX.J.

32/ Vasilskis v. Uruguay, Report. Op. cit., Thirty-eighth session (A/38/40), annex XV.

33/ Estrella v. Uruguay, Report. Op. cit.

34/ Ibid.

35/ Pratt and Morgan v. Jamaica, Report. Op. cit.

36/ Nieto v. Uruguay, Report. Op. cit., Thirty-eighth session (A/38/40), annex XX.

37/ Marais v. Madagascar, Report. Ibid., annex XI.

38/ Caldas v. Uruguay, Report. Op. cit. See also Portorreal v. Dominican Republic, Report. Op. cit., (where accused held 44 days without access to legal counsel violates article 14 (3) (b)).

39/ Lluberas v. Uruguay, Report. Op. cit., Thirty-ninth session (A/39/40), annex XII.

40/ Reid v. Jamaica, Report. Op. cit.

41/ Gómez de Voituret v. Uruguay, Report. Op. cit., Thirty-ninth session (A/39/40), annex X. The Committee bases its views on facts which appear uncontested or facts contested only by general denials. Lluberas v. Uruguay, Report. Op. cit.

42/ Torres v. Finland, Report. Op. cit., Forty-fifth session (A/45/40), vol. II, annex IX.K.

43/ Ibid.

44/ See Caldas v. Uruguay, Report. Op. cit. The Committee found that absent information about the outcome of the criminal proceedings or copies of the court decisions, it could not find that the individual had been tried or tried without undue delay and concluded that article 14 (3) (c) had been violated.

45/ Lluberas v. Uruguay, Report. Op. cit.

46/ Pratt and Morgan v. Jamaica, Report. Op. cit.

47/ Pinkney v. Canada, Report. Op. cit., Thirty-seventh session (A/37/40), annex VII.

48/ Solórzano v. Venezuela, Report. Op. cit., Forty-first session (A/41/40), annex VIII.C.

49/ Robinson v. Jamaica, Report. Op. cit.

50/ Guesdon v. France, Report. Op. cit., Forty-fifth session (A/45/40), vol. II, annex IX.G.

51/ Ibid.

52/ Conteris v. Uruguay, Report. Op. cit., para. 1.5.

53/ The Committee requested that the State provide information on whether it allowed the accused to appear in person. When it received the State's routine assurance, the facts were placed in dispute. The Committee will not decide on an issue when the facts are disputed. Gómez de Voituret v. Uruguay, Report. Op. cit.

54/ Mbenge v. Zaire, Report. Op. cit.

55/ Ibid.

56/ Ibid.

57/ Conteris v. Uruguay, Report. Op. cit.

58/ See also Cariboni v. Uruguay, Selected Decisions of the Human Rights Committee Under the Optional Protocol. Op. cit., communication No. 159/1983.

59/ Y.L. v. Canada, Report. Op. cit., Forty-first session (A/41/40), annex IX.A.

60/ V.M.R.B. v. Canada, Report. Op. cit., Forty-third session (A/43/40), annex VIII.F.

61/ Lanza de Netto v. Uruguay, Report. Op. cit., Thirty-fifth session (A/35/40), annex VI.

62/ Ibid., para. 16.

63/ Conteris v. Uruguay, Report. Op. cit.

64/ Ibid.

65/ Camargo v. Colombia, Report. Op. cit., Thirty-seventh session (A/37/40), annex XI.

66/ A Uruguayan arrested and tried by a military court under "prompt security measures" alleged that his trial violated article 14 because the court was a military court, lacking in procedural guarantees and impartiality. The Committee did not reject the allegation but failed to resolve the issue raised. Barbato v. Uruguay, Report Op. cit., Thirty-eighth session (A/38/40), annex IX.

67/ Vuolanne v. Finland, Report. Op. cit.

68/ Ibid.

69/ Torres v. Finland, Report. Op. cit.

70/ Estrella v. Uruguay, Report. Op. cit.

71/ Van Meurs v. the Netherlands, Report. Op. cit., Forty-fifth session (A/45/40), vol. II, annex IX.F.

72/ Tourón v. Uruguay, Report. Op. cit., Thirty-sixth session (A/36/40), annex X.

73/ MacIsaac v. Canada, Report. Op. cit., Thirty-eighth session (A/38/40), annex VII.

74/ Ibid.

75/ Nieto v. Uruguay, Report. Op. cit.

76/ A.P. v. Italy, Report. Op. cit., Forty-third session (A/43/40), annex VIII.A.

77/ Montejo v. Colombia, Report. Op. cit., Thirty-seventh session (A/37/40), annex XV.

78/ Fanali v. Italy, Report. Op. cit., Thirty-eighth session (A/38/40), annex XIII.

79/ Muhonen v. Finland Report. Op. cit., Fortieth session (A/40/40), annex VII.

80/ Luyeye v. Zaire, Report. Op. cit., Thirty-eighth session (A/38/40), annex XIX.

81/ Fanali v. Italy, Report. Op. cit.

Annex I

SUPPLEMENTAL SELECTED BIBLIOGRAPHY

The annex to the first brief report (E/CN.4/Sub.2/1990/34) contained a selected bibliography. Following are further references relevant to the study:

Abraham, H. The judicial process: an introductory analysis of the courts of the United States, England and France. 5th ed., 1986.

Buergenthal, T. and Kewenig, W. Zum Begriff der Civil Rights in Artikel 6 Absatz 1 der Europaischen Menschenrechtskonvention. 1966-67 Archiv des Vokerrechts 393.

Carpi, F. Responsabilità del giudice e pubblicità processuale, 78 Rivista Trimestrale di Diretto e Procedura Civile 1464, 1980.

Fassler, L. The Italian penal procedure code: an adversarial system of criminal procedure in continental Europe, 245 Columbia J. Transnational Law 216, 1991.

Frase, R. Comparative criminal justice as a guide to American law reform: How do the French do it, how can we find out, and why should we care? Calif. L. Rev. 78: 539, May 1990.

International Commission of Jurists. The independence of judges and lawyers in the Commonwealth Caribbean. Geneva, International Commission of Jurists, 1988, 66 p.

The independence of the judiciary and the legal profession in English-speaking Africa. Geneva, International Commission of Jurists, 1988, 184 p.

Inquiry into the Israeli military court system in the occupied West Bank and Gaza. Geneva, International Commission of Jurists, 1989, 74 p.

International Criminal Procedure Symposium. Temple L. Rev. 62: 1087, Winter 1989.

Kopetzki, C. Neue Aspekte des Art. 6 MRK fur Osterreich. Juristische Blatter 103: 468, 1981.

Luther, H. Public hearing in the absence of the accused person. Int'l Acad. Comp. L. 969, 1978.

Miller, M. and Guggenheim, M. Pretrial detention and punishment. Minn. L. Rev. 75: 335, December 1990.

Moitry, J.-H. Right to a fair trial and the European Convention on Human Rights: some remarks on the République de Guinée case. Journal of Int'l Arbitration 6 (2): 115, June 1989.

Newman, F. and Weissbrodt, D. Bibliography for research on international human rights law. In: International human rights: law, policy, and process 733-61 (Cincinnati: Anderson Publishing Co. 1990).

Rasenack, C. "Civil rights and obligations" or "droits et obligations de caractere civil" - Two crucial legal determinations in article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. R.D.H. 3: 51, 1970.

Rodley, N. The treatment of prisoners in international law, 256-77 (Oxford: Clarendon Press, 1987).

Starkey, "Trial in absentia". St. John's L. Rev. 53: 721, 1979.

Stavros, S. The guarantees for accused persons under article 6 of the European Convention on Human Rights: an analysis of the application of the Convention and a comparison with other instruments (Queen Mary College, University of London, 1989). 550 p. (thesis).

Sturner, R. "Fair trial" und offentliche Meinung, Juristenzeitung 35: 1, 1980.

van Dijk, P. The interpretation of "civil rights and obligations" by the European Court of Human Rights; one more step to take. In: F. Matscher and H. Petzhold (eds.) Protecting human rights: the European dimension; studies in honour of Gerard J. Wiarda. 131, 1988.

The maze of paragraph 1 of article 6 of the European Convention on Human Rights: new openings or dead ends? Hague Yearbook of Int'l Law 1: 141, 1988.

van Dijk, P. and van Hoof, G.J.H. Theory and practice of the European Convention on Human Rights. Deventer, The Netherlands, Kluwer Law and Taxation Publishers, 2d ed., 1990.

Valu, J. Le probleme de l'application aux juridictions administratives, des règles de la Convention européene des droits de l'homme relatives a la publicité des audiences et des jugements. R.D.I.D.C. 129: 159, 1961.

von Mangoldt, H. Independence of judges and lawyers under German law and under the European Convention on Human Rights. Tidskrift, utgiven av Juridiska Foreningen 117: 101, 1981.

Annex II

PRELIMINARY (REVISED) QUESTIONNAIRE ON THE RIGHT TO FAIR TRIAL

Part I

A. The rapporteurs would be pleased to receive any comments you may wish to make about the brief report contained in E/CN.4/Sub.2/1990/34.

B. Civil procedure

The rapporteurs would be pleased to receive information about codes, rules, regulations, decisions and/or practices which have been established governing procedures in civil disputes including: procedures governing a person's access to the judicial system, the procurement and use of evidence, trial procedures, examination of witnesses and appeal or other review of trial court decisions.

C. Criminal procedure

The rapporteurs would be pleased to receive information about codes, rules, regulations, decisions and/or practices which have been established governing criminal procedure including: judicial protection from arbitrary arrest; the procurement of, access to, and presentation of evidence; trial procedures, appeal or other review; and post-conviction relief.

D. Administrative procedure

The rapporteurs would be pleased to receive information about codes, rules, regulations, decisions and/or practices which have been established governing administrative procedures - in particular those procedures that may have consequences similar to criminal procedures.

E. Military court procedure

The rapporteurs would be pleased to receive information about codes, rules, regulations, decisions and/or practices which have been established governing military court procedures (including procedures that may affect the rights of civilians) in regard to the issues mentioned under item C above.

F. Emergency or special court procedures

The rapporteurs would be pleased to receive information about codes, rules, regulations, decisions and/or practices which have been established governing emergency or special court procedures that may have consequences similar to criminal procedures in regard to the issues mentioned under item C above. Please explain how these emergency or special court procedures differ from ordinary procedures.

G. Request for codes, rules, regulations, or decisions

If such codes, rules, regulations, or decisions with regard to procedures in civil, criminal, administrative, military or emergency/special proceedings have been established, please send a copy of each to the Centre for Human Rights, United Nations, Palais des Nations, CH-1211 Geneva 10, Switzerland. If possible, please send a copy in English, French, Spanish or one of the other official languages of the United Nations. If the codes, rules, regulations or decisions are too voluminous, please indicate how and where the two Special Rapporteurs may obtain access to those materials. For example, are the current versions of those materials possessed by the United Nations Library in Geneva and/or New York?

Part II

Your answers to each of the questions below would be appreciated as to both codes, rules and regulations as well as actual practices. If it is too difficult or time consuming to answer all the questions, please give the greatest attention to answering each of the subject heading questions (in bold print and preceded by numbers).

A. Treatment during detention prior to and during trial

1. How are detained persons protected from torture and other cruel, inhuman or degrading treatment?

2. What protection exists for the accused who refuses to confess or testify against himself or herself?

(a) Does an accused have the right to remain silent?

(b) Can an accused's silence be used against him or her at trial?

(c) Can a confession be used against an accused that was obtained without the benefit of counsel or knowledge of the right to counsel?

(d) What protection does an accused have from a coerced or otherwise unlawfully obtained confession (whether obtained from the accused or another person) being used against him or her at trial?

(e) Must an accused know the consequences of the confession, such as the potential sentence, before a lawful confession may be taken?

(f) If a confession was made as a result of an agreement with the prosecutor, how does an accused enforce the agreement? Can an accused withdraw the confession if the agreement is not fulfilled?

3. How are accused persons in detention treated differently from convicted prisoners?

(a) Are accused persons segregated from convicted prisoners?

4. To what extent is it the general rule that persons awaiting trial shall not be detained in custody, so that they can assist in the preparation of their defence?

5. To what extent is habeas corpus, amparo, or similar remedy available for challenging conditions of pretrial detention or the failure to provide fair procedures prior to trial?

B. Notice

1. How long can a person be detained without being charged for a criminal offence or without having his/her case submitted to a court?

2. How is an accused person guaranteed prompt, detailed notice of the charge(s) against him or her?

(a) What provisions are made to ensure that the accused is given notice in a language that he or she can understand?

3. How is the accused guaranteed adequate time and facilities to prepare his or her defence?

(a) How long after a person is detained before the person has a right to access to counsel?

(b) How much time and at what stage of the proceedings does the defence counsel have to prepare for trial?

(c) What access does the accused have to the evidence prepared for use against him or her, such as the names of witnesses?

(d) What protection does the accused have from surprise evidence being introduced at trial?

C. Counsel

1. Does the accused have access to counsel in preparing his or her defence?

(a) If so, is the accused informed that he or she has the right to counsel?

(b) What guarantees assure the accused adequate time for consultation?

(c) What guarantees does the accused have in exercising his or her free will in choosing counsel?

(d) What procedures are established to ensure that a detained person is able to contact counsel?

2. What arrangements are made for accused persons who cannot afford counsel to receive counsel without cost?

(a) What remuneration does appointed counsel receive? How does that amount compare with what counsel would normally expect to receive from a paying client?

(b) Are there certain kinds of crimes for which counsel is provided without cost to defendants who cannot afford counsel?

(c) Under what circumstances is counsel appointed without cost through the appeals and post-conviction processes?

3. What protection does the accused have ensuring the competence of counsel, adequacy of representation, and the adequacy of facilities for the preparation of the defence at all stages of the investigation, trial, appeal and post-conviction processes?

4. Does a person's right to counsel extend through the post-conviction level, such as habeas corpus or amparo?

5. How is the confidentiality of communication between the accused and counsel guaranteed?

D. Hearing

1. How is the accused's right to be tried without undue delay guaranteed?

(a) Does that protection apply at all stages of the trial process, including the time by which a trial is commenced, completed, decided and appealed?

(b) If possible, please provide statistics for the average amount of time that elapses between:

1. Arrest and formal charging with an offence.

2. Charging with an offence and beginning of the trial.

3. Beginning of the trial and completion of the trial or sentence.

4. Initiation of appeal and the disposition of appeal.

(c) What differences are characterized by the delays which occur in trials relating to different sorts of criminal charges?

(d) Is there a difference in the amount of time it takes to initiate a trial for a detained defendant and a defendant not in custody?

2. What laws or rules are there mandating that criminal and civil trials be conducted in public?

(a) When a trial is conducted in public, what guarantees are there allowing the press to witness and report on the proceedings by television, radio, photographs and/or print media?

(b) How, and under what circumstances, is public or press access to a trial limited? Please describe specific examples of trials which were not held in public during the last two years.

3. What assurances does the accused have that the trial will be conducted in the same geographic locality where the conduct at issue occurred?

(a) Under what circumstances might a trial be transferred to another locality?

(b) May the court transfer the trial to another locality if it appears that the accused would be unable to receive a fair trial due to local bias?

4. Under what circumstances, if any, is a trial in absentia pursued?

(a) What protection does the accused have to guarantee that he or she knows all the evidence considered at a trial in absentia?

(b) How is a person's right to counsel applied to hearings in absentia?

(c) Under what circumstances, if any, is it possible to have a trial of a person who is not living?

5. What protections are afforded the mentally incompetent at criminal trials?

(a) How is a person determined to be mentally incompetent for the purposes of trial?

(b) Can a mentally incompetent person be tried?

6. How is an accused person's entitlement to the free assistance of an interpreter guaranteed if he or she does not understand the language of the court?

(a) Does the interpreter provide interpretation of the entire proceeding including argument of counsel, all testimony, or only testimony given by the accused?

(b) Are all court documents translated?

(c) Does the accused have a choice of interpreters, for example, among dialects?

7. What protections exist to guarantee an accused the right to obtain the attendance and examination of witnesses on the accused's behalf under the same conditions as witnesses against the accused?

8. What guarantees protect the accused's right to examine adverse witnesses?

9. How is the accused's right to the presumption of innocence guaranteed?

(a) What protections exist to prevent public authorities from manipulating the media or judicial system so as to prejudge the outcome of a trial?

(b) What guarantees does the accused have to a judgement based on the evidence adduced at the hearing?

(c) What is the degree of proof required to find a person responsible for criminal conduct?

(d) What is the degree of proof required for determining rights and obligations in a civil suit?

10. How is a party to a civil suit guaranteed the opportunity to obtain and examine relevant witnesses at trial?

11. Can evidence be considered against an accused if the evidence is obtained pursuant to an arbitrary or unlawful interference with the accused's privacy, family, home or correspondence?

E. Composition of the court

1. What protection exists to guarantee the independence and impartiality of judges? 1/

(a) How are the guarantees in the Basic Principles on the Independence of the Judiciary 2/ implemented?

2. In criminal and civil cases, under what circumstances may a person receive a trial by judge(s), jury and/or by lay assessor(s)?

(a) Does a party or accused person have a right to trial by jury or lay assessor(s)?

(b) What characteristics must a person have to qualify as a juror or lay assessor?

(c) Are there any characteristics that disqualify or excuse a person from being a juror or lay assessor, such as active military service, profession, gender, past criminal record, alien status, membership in a particular political or ethnic group, etc.?

(d) How may one of the parties disqualify a judge, juror, or lay assessor who may be biased?

(e) Under what circumstances is a trial by jury or lay assessor forbidden? Are there specialized courts that do not permit trials by jury or lay assessor?

F. Decision, sentencing and punishment

1. Under what circumstances must the decision-maker issue a public statement of reasons explaining the decision in a criminal case?

2. Under what circumstances must the decision-maker issue a public statement of reasons explaining the decision in a civil case?

3. What rights does a person have to avoid being tried or punished again for an offence of which he or she has already been lawfully convicted or acquitted?

4. What protection does the accused have from being convicted under ex post facto laws?

(a) Where the punishment for an offence has changed, what protections exist to ensure that the accused will not receive a greater punishment than that which applied at the time of the occurrence of the crime, or will receive the lesser punishment if the punishment has since been decreased.

5. What protection is provided against imprisonment for failure to fulfil a contractual obligation?

6. What assurances are given that the judgements rendered in criminal cases and civil suits are made public?

7. Under what conditions are judgements not made public?

8. Under what circumstances, if any, is collective punishment permitted?

9. Has the country abolished the death penalty? If not:

(a) For what kinds of crimes may the death penalty be imposed?

(b) How and when is the person informed of the death sentence?

(c) How does a person who is sentenced to death seek pardon or commutation of the sentence?

(d) May juveniles (under the age of 18 at the time of the offence), pregnant women, mothers of young children or mentally retarded persons be executed?

(e) What is the maximum age, if any, over which a person may not be executed?

(f) What guarantees have been established to ensure that the death penalty is inflicted so as to minimize suffering?

10. What protection does a convicted person have from punishment that is cruel, degrading or that involves torture or mutilation?

G. Appeal or other review in higher courts

1. How does a person convicted of a crime have his or her sentence reviewed by a higher tribunal?

(a) What limits, if any, are there to the convicted person's right to have the sentence reviewed by a higher tribunal?

(b) How much time after sentencing does a convicted person have to file a notice of appeal or to complete the appeal?

(c) What kinds of crimes, if any, may not be reviewed by a higher tribunal because they are considered too trivial?

(d) May the appeal relate to issues of fact, law or both?

(e) Does the convicted person have the right to counsel on appeal? How does this right differ, if at all, from the right to counsel before or at trial?

2. How does a person appeal a judgement from a civil suit?

(a) What limits, if any, are there to a party's ability to obtain an appeal before a higher tribunal?

(b) May the appeal relate to issues of fact, law or both?

3. In criminal cases and civil suits, at what point in the trial may a party appeal an intermediate decision rendered prior to the final judgement?

(a) Under what circumstances must a party wait until a final judgement before an appeal may be made?

H. Pardon

1. What assurances does every convicted person have of the opportunity to seek pardon or commutation of his or her sentence?

I. Other remedies

1. What judicial or other legal remedies does a person have for a violation of fundamental rights?

2. Under what circumstances, if any, can the right to habeas corpus, amparo or similar remedies be suspended?

3. When a person has been convicted and punished for an offence and that conviction is subsequently reversed, or the person is pardoned due to new evidence showing that there was a miscarriage of justice, what recourse does the convicted person have to receive compensation for the injury suffered?

4. What remedies are available for a person to vindicate a violation of a fundamental right guaranteed by the constitution or under law?

(a) Are remedies similar to or including habeas corpus or amparo available? If so, please specify what provisions of law apply and include a copy of those provisions.

(b) If it is determined that a person's rights have been violated, what compensation is made for damages?

(c) Are there certain violations of fundamental rights that may not be raised at trial, after trial, on appeal, by habeas corpus, by amparo, pursuant to other post-conviction procedure or civil suit?

J. Procedures for juveniles

1. What special procedures exist for juvenile offenders?

(a) How do these special procedures take account of the juvenile offender's age?

(b) What special procedures are there for the speedy adjudication of cases against juveniles?

2. What special procedures, if any, apply to juveniles in civil proceedings?

3. What protection does a juvenile offender have from the imposition of corporal punishment?

4. How are accused juveniles treated differently from accused adults?

(a) Are accused juveniles in detention segregated from accused adults?

5. Are accused juveniles in detention segregated from juveniles who have been found responsible for criminal conduct?

K. Military courts

1. How do procedures in military courts differ from the procedures in ordinary criminal courts?

2. To what extent are the procedural protections, identified above in subparts A-J provided in military courts?

3. Under what circumstances may military courts try civilians for offences or otherwise affect the rights of civilians?

L. Emergency of special courts

1. Under what circumstances may emergency or special court procedures be established or applied?

2. How do procedures in emergency or special courts differ from the procedures in ordinary criminal courts?

3. To what extent are the procedural protections, identified above in subparts A-J, provided in emergency or special courts?

M. Administrative courts

1. How do procedures in administrative proceedings differ from the procedures in ordinary criminal or civil courts?

2. To what extent are parties to administrative proceedings given notice of information that may adversely affect them; a fair and public hearing by a competent, independent and impartial tribunal established by law; an opportunity to present information supporting their claim or defence; a decision based upon the information adduced at the hearing; and a decision which is made public?

3. To what extent are the other procedural protections, identified above in subparts A-J, in so far as relevant, provided in administrative proceedings?

N. Other questions

1. The rapporteurs would be pleased to receive information about the principal books and articles relating to the right to a fair trial in your country.

2. The rapporteurs would be pleased to receive information about any academic or other views about the brief report contained in E/CN.4/Sub.2/1990/34.

3. The rapporteurs would be pleased to receive any other information you may wish to provide.

Notes

1/ As to this question respondents are referred to Singhvi, L.M. "The administration of justice and the human rights of detainees: study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers," (E/CN.4/Sub.2/1985/18 and Add.1-6).

2/ General Assembly resolution 40/146 of 29 November 1985. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985, and endorsed by Official Records of the General Assembly, fortieth session, supplement No. 53 (A/40/53).